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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1044

JIGGS, INC., PHILIP LEVINE, PHYLLIS LEVINE, JOSEPH LEVY, IRENE LEVY and I. E. INCORPORATED,

Petitioners,

against

SLUMBERTOGS, INC., HERBERT B. LEVENSON and "JULI" LEVENSON,

Respondents.

RESPONDENTS' BRIEF

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The One Question Presented: Where District Court entered judgments against petitioners following their repeated willful refusals to obey the Court of Appeals' direction for a prompt trial, and their repeated willful refusals to obey orders of at least six judges of the District Court and rules required for the expeditious conduct of litigation, and where the Court of Appeals unanimously affirmed, holding that District Court "acted well within the limits of sound discretion", has there been such a "far departure from the accepted and usual course of judicial proceedings" as to call for an exercise of this Court's power of supervision? 1

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Question Presented

Where District Court entered judgments against petitioners following their repeated willful refusals to obey the Court of Appeals' direction for a prompt trial, and their repeated willful refusals to obey District Court's orders and rules required for the expeditious conduct of litigation, and where the Court of Appeals unanimously affirmed, holding that District Court "acted well within the limits of sound discretion", has there been such a "far departure from the accepted and usual course of judicial proceedings" as to call for an exercise of this Court's power of supervision?

The facts establish the petitioners' repeated and deliberate contempt of the Orders of the Court of Appeals, and

the Orders of six judges, and the rules of the District Court, to the point that Chief Judge Ryan at long last was obliged to enter the order granting judgments against these petitioners, and the Court of Appeals was impelled, not only to find no abuse of discretion, but to add its approval of the manner in which that discretion was exercised, holding:

> "In view of the dilatory and contumacious conduct of plaintiffs and their counsel in virtual defiance of the rules and orders of at least six judges in the district court, the sanction of dismissal was reasonable and correct" (20-21)*

Facts

An Order of the Court of Appeals entered herein on October 23, 1964 directed

> ". . . that the District Court require all depositions and discovery to be completed within 20 days and set the trial for as soon as possible thereafter, preferably within 30 days from the date of this order . . ." (35b)

Petitioners served a Demand for Interrogatories to which respondents promptly served their Answer. Then respondents promptly served on November 27, 1964, their Demand for Interrogatories upon the petitioners. That was the only discovery sought by the respondents from the petitioners in the main action and the final discovery necessary to permit a pre-trial order to be entered and to permit these actions to proceed to trial. Petitioners, contumaciously, refused to answer those interrogatories and refused to deliver signed transcripts of previously completed depositions, despite repeated orders to do so.

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* Page references without any identification letter, refer to petitioners' petition and annexed Appendix filed in this Court; those followed by "a" refer to petitioners' Appendix in the Court of Appeals; and those followed by "b" to respondents' Appendix in the Court of Appeals.

A. The petitioners' contumacious violation of orders of six judges, which supported and required Judge Ryan's order and judgments, from the affirmance of which certiorari is sought.

Judge Ryan was not the first judge, but, as noted by the Court of Appeals, the *sixth judge,* in this case to comment on the petitioners repeated contumacious conduct which the Court could neither control nor curb. That history was placed in the record before Judge Ryan, and we respectfully urge it overwhelmingly supports his decision.

Discovery was used by the respondents to establish the fraud and perjury upon which the petitioners' claims were based. Inevitably the petitioners tenaciously refused to produce before trial the fictitious "facts" and "documents" which they falsely alleged existed.

On August 24, 1964 Judge Palmieri noted on a prior motion respondents made for judgment because of the petitioners contumacious concealment of alleged facts (5b, 13b to 15b):

> "I am convinced from their conduct in this case that they will not do anything to cooperate with you because *they have in their hands the proof which you need* to sustain your case. They *will not give it to you unless they are forced.* The only way to behave with people like that is to just systematically lay the groundwork for a contempt order. They need the persuasion of the clank of a jail door that closes in on them. . . .
> "My own suggestion, in view of the shameful way in which they have imposed upon you here and the way they have acted about this purported compliance and the shameless manner in which they attempt to come before me and claim they have complied with this, leads me to believe that you will need more persuasion than you will have from just an order of this

Court. *They tread the orders of this Court underfoot.* . . .

"I think they are *courting a dismissal.* A dismissal of a suit short of trial is looked upon with disfavor by the Court of Appeals, especially in the Court of Appeals for the Second Circuit.

"This man is going to scream that he didn't have his day in court and that he could have produced this, that and the other thing. . . .

"Mr. Greenburg: . . . This is procedural anarchy.

"The Court: That is what it amounts to. . . .

"I will hold in reserve your motion to dismiss. I allowed you, in the order I signed, to make a motion for a dismissal in the event they did not comply.

"In my opinion, they did not comply. They are attempting in the most transparently insincere and shameful fashion to *frustrate the orders of this Court.* I am convinced of that on the basis of the record of this motion and on the basis of the whole background of the case.

"But, I suggest to you that there is no point in my giving you a remedy that you can't be absolutely sure of holding on to on appeal."

Judge Palmieri had previously commented about the appellants' conduct:

"I have attempted to understand the so-called affidavit of compliance of the other side, and, Mr. Bader, I am profoundly shocked by the equivocations, incoherent, lack of frankness and *obvious dilatoriness* on the part of your client as well as your firm in complying with the order of this Court.

"I have had to spend many hours going into the background of this case, reading the decisions of other judges, trying to understand your paper. Your record of non-compliance, to put it mildly, is shocking." (7b)

"I am not interested in your efforts because your efforts are nothing more than obfuscation, avoidance. That is all your efforts are." (7b)

"You have imposed for two years on your adversary, and I promise you you are not going to impose on me any longer or on this Court any longer." (8b)

". . . for you to keep saying that you will produce whatever you can and cooperate to the best of your ability is nothing more than a sham, a sham, an outright sham." (9b)

"This affidavit of compliance that was submitted in this case is absolutely shocking." (10b)

Judge Palmieri overruled the petitioners' excuse that they could not produce certain documents because they were in the hands of their lawyer, one of whom was an attorney of record in that Court, and of their insurance brokers. The petitioners' counsel ignoring Judge Palmieri's ruling, wrote to respondents' counsel, refusing to produce those documents, stating:

". . . our clients cannot be ordered to produce documents that they do not have." (22b)

The sworn and diametrically contradictory statements of the petitioner Joseph Levy had been set before Judge Thomas F. Murphy, on an earlier phase of this case concerning which Judge Murphy wrote:

"We get the impression . . . that the defendants through Levy are, to put it mildly, far from candid." (23b)

That decision resulted in a preliminary injunction granted by Judge Murphy, which the petitioners proceeded to ignore. When they were cited to show cause why they should not be adjudged in contempt, petitioner Levine

explained his noncompliance:

> "My attorneys have advised me that the determination of the District Court was without warrant in either law or fact." (70b)

Judge Levitt after hearings on that motion ruled:

> "The controversy centers around the facts that the defendants were dilatory in response to the affirmative requirements of the preliminary injunction. However, in spite of their tactics, but due perhaps to the prodding of the contempt proceeding, defendants have now fully complied with the injunction.
>
> "There is no doubt that the defendants were averse to comply with the injunction . . ." (25b)

Respondents moved before Judge Weinfeld for summary judgment dismissing the anti-trust complaint in one of the consolidated actions. Judge Weinfeld decided that motion prior to the Second Circuit's decision in *Dressler* v. *N. B. Sandpiper*, 331 F. 2d 130 (C. A. 2, 1964), and without benefit of that authority, denied the motion. However, petitioners' anti-trust allegations were so incredible that Judge Weinfeld urged the completion of the pending depositions and held:

> ". . . the motion is denied, but with leave to renew upon completion of the *pending depositions*. If it eventually should develop that the process of this Court has been *abused*, an appropriate remedy appears to be available—Rule 11 of the Federal Rules of Civil Procedure." (73b)**

Subsequently, petitioner Levy, the petitioners' sole witness in support of that anti-trust allegation, repudiated under oath all of the allegations of the subscribed com-

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** Disbarment proceedings.

plaint. He testified that he knew of no price cutting by respondents (31b); there were no instances of disparagement of petitioners' products by respondents (31b-32b); in the garment industry, the large retailers were obtaining special prices from "everybody", presumably including himself, and if price discrimination had occurred it was given only to meet prevailing competitive conditions (32b).

Petitioner Jiggs, Inc. had closed its business in December 1963, and the issue and controversy between the parties had long since become moot and academic (87b). Petitioners Philip and Phyllis Levine left the industry and are in the restaurant business (97b). Neither petitioners Philip Levine, Phyllis Levine, nor any other representative of Jiggs, Inc. appeared at any of the hearings before Judge Ryan, nor filed any affidavit of merits or requested vacatur of the judgments, nor expressed any interest in continuing the actions.

The only apparent explanation for petitioners' persistence, and for the continuance of this proceeding is the surety company bond respondent posted on obtaining the preliminary injunction granted by Judge Murphy, which was later vacated on new papers. No Court has ever suggested that the injunction was improperly granted on the original papers (103b).

The penultimate proceedings before Judge Cashin occurred in the Pre-trial Part after the Court of Appeal's order of October 23, 1964 (35b). Those events necessitated the subsequent order by Chief Judge Ryan appointing a *Rule 2 Judge* (District Court Rule 2) and contributed to the Court's final order dismissing the petitioners' pleadings. Those climactic events were:

1. November 27, 1964, the respondents served a demand for interrogatories upon the petitioners. Instead of answering in the normal 10-day period, they requested and were granted 34 days until December 31 to answer those interrogatories (41b).

2. December 31, 1964, petitioners' counsel requested a stipulation further extending petitioners' time to answer those interrogatories until February 15, 1965 (55b). Respondents' counsel refused the request (41b).

3. January 25, 1965, Judge Cashin granted a third extension to petitioners to answer the interrogatories to February 18, 1965 (58b, 92b-93b).

4. February 18, 1965, petitioners' counsel, instead of complying with the order of Judge Cashin, on this date wrote to respondents' counsel that

> ". . . it is quite true that I have the information sufficient to answer the interrogatories . . ." (61b)

Nevertheless, petitioners refused to deliver the interrogatories as ordered by the Court.

5. February 23, 1965, petitioners requested and obtained from Judge Cashin a fourth extension until March 9 to answer the interrogatories (93b).

6. March 9, 1965, petitioners again ignored the orders of the court and respondents moved to strike the petitioners' pleadings, and made an application to Chief Judge Ryan for the appointment of a case Judge under District Court General Rule 2 (1b, 37b).

B. The petitioners' contumacious conduct before Judge Ryan, which finally resulted in the judgments, from the affirmance of which certiorari is sought.

7. March 22, 1965, on the return of the above motions, Judge Ryan told Mr. Maximilian Bader, petitioners' counsel, that he would grant a fifth extension of an additional 10 days in which to answer the interrogatories and that there would be no further delay beyond that date (91b).

8. April 7, 1965, the order of Judge Ryan endorsed on the back of the motion papers, confirmed what the Judge had told Mr. Bader on March 22, but in effect granted a sixth extension of an additional 10 days from April 7. The order directed that:

> ". . . defendants are given an additional 10 days from the date hereof in which to answer. We will not, however, accept any delay beyond this period." (5a)

Thereafter, in regular course, the Clerk of the District Court mailed three postcards to petitioners' attorneys advising of the entry of the order (75b, 76b, 78b, 80b). The supervisor of the Clerk's Docket Section verified that she personally handled the mailing of the notices (75b). The customary notice also was published in the New York Law Journal advising of the entry of the order (82b).

9. April 19, 1965. The petitioners now having ignored Judge Ryan's final oral order of March 22 and his final written order of April 7, respondents' counsel submitted an affidavit and proposed order to Judge Ryan, which was duly entered and docketed (66b, 67b).

10. April 26, 1965. Petitioners' counsel, still without submitting the interrogatories or attempting in any way to comply with any of the orders of the Court, obtained an order to show cause from Judge Ryan returnable before him, to vacate his order and the judgments entered on it.

11. April 30, 1965. A hearing was held by Judge Ryan on that order to show cause (89b-104b). The petitioners *still* did not comply with any of the prior orders of the court. Concerning such persistent contempt, the record, at 92b-94b, shows:

> "The Court: Have you prepared the answers to the interrogatories?
>
> Mr. Bader: Yes, your Honor, I have prepared them.

I want to discuss the matter with Mr. Levy and Mr. Levine, and I represent to your Honor that I can—

The Court: Have you put them in final form as yet?

Mr. Bader: I have put them in draft form. I could have them in final form by 4 p.m. today, your Honor.

The Court: You were ordered to answer these interrogatories by Judge Cashin, weren't you, as late as February 18, 1965?

Mr. Bader: By stipulation, your Honor. That was not by means of order.

We had had a number of—

The Court: Was the stipulation approved by Judge Cashin?

Mr. Bader: Yes, your Honor.

The Court: So that it became an order of the court entered on consent.

Mr. Bader: Yes, your Honor.

The Court: So that when I stated that you were ordered by Judge Cashin to answer these interrogatories on February 18, 1965, I stated a fact, didn't I?

Mr. Bader: You did, your Honor.

The Court: Now, then following that, was this matter again on before Judge Cashin on February 23, 1965?

Mr. Bader: Yes, your Honor.

• • •

The Court: On that date did Judge Cashin give you a further extension to answer these interrogatories to March 9th?

Mr. Bader: Yes, your Honor.

The Court: And did you answer them on March 9th?

Mr. Bader: We could not answer them.

The Court: Did you answer them?

Mr. Bader: No, your Honor, we did not.

The Court: Did you then apply to, or did Judge Cashin give you, a third extension of time to March 23, 1965 to answer these interrogatories?

Mr. Bader: Yes, your Honor.

The Court: Did you answer them?

Mr. Bader: No, your Honor, we could not, we were in no position to.

The Court: And you have not to this date?

Mr. Bader: We have prepared—

The Court: Wait a minute, please.

You have not answered them to this date, have you?

Mr. Bader: No.

The Court: Now, do I direct in my endorsement dated April 6 that these interrogatories be answered within five days?

Mr. Bader: Yes, your Honor, you so directed.

The Court: That was the fourth extension of time that you had been granted?

Mr. Bader: Yes, your Honor.

The Court: By Judge Cashin and by an additional extension of time by me?

Mr. Bader: Yes, your Honor."

Judge Palmieri had accurately analyzed the appellants' contemptuous attitude, and predicted and warned them of the inevitable consequences:

> "They tread the orders of this court under foot . . ." (13b)
>
> "I think they are courting a dismissal . . ." (14b)
>
> "This man is going to scream that he didn't have his day in court and that he could have produced this, that and the other thing." (14b)

Most respectfully we submit, on this record Judge Ryan exercised sound judicial discretion in granting the order and judgments petitioners now complain of, the Court of Appeals was correct in not intefering with Judge Ryan's discretion and in expressly approving his action, and there is no call for this Court's exercise of supervisory powers through Certiorari.

Corrections of Petitioners' Statement of "Facts Involved"

1. At page 2 of the petition, petitioners erroneously assert a valid and prior interest in the trademark "Slumba-togs". In fact:

a) Respondent Slumbertogs, Inc., since 1944 has been owner of the trademark "Slumbertogs" registered on the principal and supplemental registers in the United States Patent Office. Its sales are well in excess of a million dollars a year, and many hundreds of thousands of its "Slumbertogs" trademark labels have been attached to each garment it has sold in the women's and children's sleepwear industry during the past 20 years. (22b)

b) Petitioner Jiggs was organized in April, 1962. It adopted the confusingly similar trademark "Slumba-Togs" which it used on a line of women's and children's sleepwear in direct competition with plaintiff. (22b)

c) Petitioners assert that after this litigation was started they belatedly acquired title to their trademark from a corporation controlled by petitioner Levy which previously had used "Slumba-togs" But their alleged assignor corporation was insolvent and its trademark was the property of its creditors and could not be assigned by the corporation and also, the alleged trademark assignment was admittedly without consideration and unaccompanied by "good-will" any going business, or assets, and was therefore void as a "naked assignment" under State and Federal law. (26b) *Uncas Mfg. Co.* v. *Clark & Coombs Co.*, 200 F. Supp. 831 (1962); *Browning King Co. of N. Y.* v. *Browning King Co.*, 176 F. 2d 105, at 107; *Golenpaul* v. *Rossett*, 174 Misc. 114, at 118; *Avon Shoe Co.* v. *David Crystal, Inc.*, 171 F. Supp. 293, affd. 279

F. 2d 607; *Falk* v. *American West Indies Trading Co.*, 180 N. Y. 445.

2. At pages 2 and 3 petitioners assert that respondents refused to pay a bill of costs. In fact, petitioners did not enter an order fixing the amount of costs payable. Petitioners' counsel, in his letter of February 18, 1965, stated:

> "You will note that I have not yet entered the order with reference to the trial date and for payment of costs by your client since I did not feel that I should do so until I should have answered your interrogatories." (61b-62b)

Respondents themselves subsequently ascertained the amount of costs, and petitioners received full credit upon the respondent's Bill of Costs following the dismissal.

3. At page 4, petitioners argue erroneously that their response to the interrogatories was somehow related to the motion for consolidation. This contention is patently contrived. In his affidavit sworn to February 8, 1965 in support of his motion for consolidation, petitioners' counsel conceded the contrary by stating, regarding the discovery, that:

> "Pretrial proceedings in these actions have been combined, depositions have been taken in all three actions simultaneously."

POINT I

Answering petitioners' Point I, there was no violation of the Fifth Amendment because petitioners had no legal trademark property to be deprived of, and the proceedings below were conducted with an excess of zeal for due process of law.

As shown above, petitioners were junior users by many years of a trademark confusingly similar to the respondents' mark. Even after improvising a fictitious "chain of

title" to an alleged prior user, their title failed because their "assignments" were void. Thus, they had no legally recognized trademark property to be deprived of (22b, 26b).

Secondly, their alleged anti-trust causes of action were repudiated under oath by their sole witness, and can hardly be described as a lost "property" right (31b-32b).

Finally, the dismissals followed a series of proceedings in which the processes of the law and rules were scrupulously observed by at least six District Court Judges, three Court of Appeals Judges, and all save the petitioners, as recounted by Judge Ryan at pages 9-11, *supra*.

The Federal Judiciary has long recognized that the striking of pleadings in cases of wanton abuse of procedure is appropriate and necessary to protect the dignity and function of the Court, as well as to protect the rights of litigants. Rule 37, Rules of Civil Procedure; *Hammond Packing Company* v. *State of Arkansas,* 212 U. S. 322, 295 S. Ct. 370, at 380; *Von Der Heydt* v. *Kennedy,* 299 F. 2d 459 (C.A.D.C., 1962), cert. den. 370 U. S. 916; *Bourgeois* v. *El Paso Natural Gas Co.,* 20 F.R.D. 358 (D.C.N.Y., 1957); *V. O. Machinoimport* v. *Clark Equipment Co.,* 12 F.R.D. 191 (D.C.N.Y., 1951); *Mooney* v. *Central Motor Lines,* 222 F. 2d 569 (C. A. 6); and *First Iowa Hydro Electric Coop.* v. *Iowa Illinois Gas & Electric Co.,* 245 F. 2d 613 (C. A. 8).

The constitutional validity of dismissal for refusal to make discovery was established by this Court in *Hammond Packing Company* v. *State of Arkansas,* 212 U. S. 322, 295 S. Ct. 370, at page 380:

> "And, beyond peradventure, the general course of legislation and judicial decision in the several states indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by proper regulations

prescribed by the legislative authority, and, for a failure to give or produce such evidence, the law might authorize a presumption in a proper case against the party refusing, justifying the rendering of a judgment by default, as if no answer had been filed . . .

As the power to strike an answer out and enter a default, conferred by § 9 of the act of 1905, which is before us, is clearly referrable to the undoubted right of the law making authority to create a presumption in respect to the want of a foundation of an asserted defense against a defendant who suppresses, or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation."

In *T.W.A.* v. *Hughes,* the Court struck defendant's answers and counterclaims, and granted judgment to T.W.A., because of Howard Hughes' refusal to submit to pre-trial examination. 332 F. 2d 602 (1964), cert. dismissed 380 U. S. 248, 85 S. Ct. 934 (1965). Judge Lumbard's opinion at page 614 is particularly applicable at bar:

"The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed. See *Nasser* v. *Isthmian Lines,* 2d Cir., 1964, 331 F. 2d 124; *Link* v. *Wabash Railroad Co.,* 370 U. S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962); *Gill* v. *Stolow,* 240 F. 2d 669 (2 Cir. 1957)."

In *Nasser* v. *Isthmian Lines,* cited above in the *T.W.A.* v. *Hughes* decision, Judge Kaufman writing an affirmance of a dismissal under circumstances similar to those at bar, stated at p. 129:

> "In a complex and litigious society, procedural anarchy cannot be condoned".

It is noteworthy that Judge Palmieri considered these petitioners' actions to be "procedural anarchy" [please see p. 4 above] and it is fully consistent with sound judicial practice that neither Judge Ryan nor the Court of Appeals would condone it.

POINT II

Answering petitioners' Point II and Point IV, there is no conflict between the circuits, because at bar, petitioners *did* receive notice repeatedly that default judgment would be entered against them.

Petitioners attempt to argue that the Court of Appeals' decision constituted an approval of entry of judgment without notice, and therefore conflicts with FRCP 55(b)(2) and other Circuits. However, the Court of Appeals' decision has no such meaning and there is no conflict; the affirmance herein is based on the fact that petitioners received full and timely notice:

1 March 22, 1965—Oral notice from Judge Ryan to petitioners' counsel (91b).

2 April 7, 1965—Notice by docketing of Judge Ryan's confirmatory written order in the Clerk's Office. *Nicholas-Morris Corporation* v. *Morris,* 24 F.R.D. 478, aff'd. 279 F. 2d 81 (C. A. 2, 1960).

3 April 7, 1965—Notice, in the form of three postal cards, mailed by the Clerk of the Court to petitioners' counsel (75b, 76b, 78b, 80b).

4 Notice by the publication of the entry of the order in The New York Law Journal (82b).

5 Notice and warnings from five District Court Judges prior to Judge Ryan.

POINT III

Answering petitioners' Point III, the Court did not fail to follow its own prior "determination", because the first panel decided only the contents of the Appendix, and did not have before it and did not determine the merits of the appeal from Judge Ryan's order.

On pp. 4-5, and again in Point II (pp. 12-13), petitioners assert in error that a Court of Appeals panel made a "determination" that a trial should be held, and that the subsequent panel that affirmed Judge Ryan failed to "follow" the first panel. In fact, the only issue presented to, and the only "determination" made by the first panel, related to the contents of the Appendix on appeal. That first panel was not presented with the facts and merits of the subsequent appeal.

POINT IV

Answering petitioners' Points V, VI and VII, petitioners failed to show mistake, inadvertence, surprise, or excusable neglect, and the Court of Appeals properly refused to interfere with the "reasonable and correct" exercise of District Court's discretion.

The application to vacate was decided under the standards established in F.R.C.P. 60(b) which provides in applicable part:

"RULE 60. RELIEF FROM JUDGMENT OR ORDER.—

"(b) MISTAKES—INADVERTENCE—EXCUSABLE NEGLECT—NEWLEY DISCOVERED EVIDENCE—FRAUD. On motion and

upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise or excusable neglect . . ."

The excuse tendered by Mr. Bader that he, as petitioners' attorney of record in one of the consolidated actions did not receive one of three post cards mailed by the Clerk notifying him and his associate attorneys of the entry of the April 6th order, is irrelevant as a matter of statute. The *fact of mailing* of notice, and not proof of receipt, is sufficient notice for all purposes. Even if the Clerk had not sent the notice, it would not affect the running of time in which to take an appeal.

"Rule 77. District Courts and Clerks.—

"(d) Notice Of Orders Or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. *Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules. Lack of notice* of the entry by the clerk *does not affect the time to appeal* or relieve or *authorize the court to relieve a party for failure to appeal* within the time allowed." (emphasis added)

And, even if the Clerk of the Court had not sent notice to the petitioners, it is well established that the dismissal would not be unconstitutional. This Court held in *Link* v. *Wabash Railroad Company,* 370 U. S. 626, at pages 632 to 634:

"Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. . . . The adequacy of notice and hearing respecting proceedings

> that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.
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> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' Smith v. Ayer, 101 U. S. 320, 326, 25 L. Ed. 955."

At bar, however, there is uncontroverted proof that three, not one, post cards were mailed to the various attorneys for the petitioners. Furthermore, appellants *were told by Judge Ryan* what the order would contain (91b), the notice of entry was printed in the Law Journal (82b), and they persisted in their refusal to comply with the Order even when they moved to set aside the judgments.

In *Nichols-Morris Corporation* v. *Morris,* 24 F.D.R. 478, affd. 279 F. 2d 81 (C. A. 2, 1960), plaintiff applied for an extension of its time to appeal from a judgment. The motion was decided under F.R.C.P. 73(a) which requires the same showing of "excusable neglect" required in F.R.C.P. 60(b)(1). Plaintiff tendered the same argument, as at bar, that the Clerk had failed to send them notice. Judge Kaufman, in denying the motion, held:

> "Counsel also urged that the neglect was excusable because the clerk of the court had failed to send a

notice of entry to him as provided for in Rule 77(d) of the Federal Rules of Civil Procedure. Rule 77(d) states in part: 'Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a).' . . . The Committee's Notes go on to state: '*It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk * * * or to rely on the adverse party's failure to serve notice of the entry of a judgment.*' 28 U.S.C.A. at page 474." (emphasis added)

Judge Hand's affirmance in the Court of Appeals left no doubt that in Federal practice, the burden is on the attorney to follow the course of his action, and not to rely upon the Court or his adversary:

"The change in Rule 77(a) plainly charges the putative appellant with a duty to follow the progress of the action and advise himself when the court makes the order against which he wishes to protest. We cannot avoid the conclusion that the failure to act was the result either of a failure to understand the law, or of one of those careless omissions to which everyone is indeed subject, but which do not excuse inaction." (at p. 83)

In *Ohliger* v. *United States*, 308 F. 2d 667 (C. A. 2, 1962), plaintiff refused to answer interrogatories for two years, whereupon an order was entered dismissing the complaint. Appellant moved pursuant to Rule 60(b) to set the dismissal aside, which motion was denied by Chief Judge Ryan. In affirming *per curiam*, the Court of Appeals for the Second Circuit stated at pages 667-8, that:

"Since the date his complaint was filed, the appellant has consistently failed to prosecute his claim and to

respond to the interrogatories submitted by the defendant. Counsel justifies his conduct by pleading ignorance of the Court's rules of procedure. Surely this is not the sort of 'excusable neglect' contemplated by Federal Civil Rule 60(b), 28 U.S.C.A. as ground for vacating an adverse judgment. *Counsel's carelessness cannot be excused by this Court if it is to perform its obligation to other litigants whose cases are necessarily delayed by such conduct.* Judge Ryan's order under Rule 60(b) should be overturned only if there is a clear abuse of discretion, and none has been shown. We agree with the court below that '*efficient judicial administration dictates that the relief sought must be denied.*' " (emphasis added)

The facts at bar are similar to *Parker* v. *Broadcasting Music Inc.*, 289 F. 2d 313 (C. A. 2, 1961). Plaintiff there refused to answer questions and produce documents despite repeated orders to do so. Finally the case came before Chief Judge Ryan on the Review Calendar. Judge Ryan directed that the action would be dismissed without notice unless plaintiff filed a note of issue (implying completion of discovery) within six months. On the day the six-month period expired, plaintiff's attorney announced that he withdrew from the case. Thereupon, plaintiff was given another 30 days. At the end of this 30 days a dismissal order was entered. Subsequently, plaintiff with new attorneys moved under F.R.C.P. 60(b) before Judge Ryan to vacate the dismissal. Judge Ryan denied the application. Judge Waterman, writing for the Second Circuit, ruled that notwithstanding claims of conflict between plaintiff and her former counsel, Judge Ryan acted properly

". . . when he decided that plaintiff failed to sustain the burden required under Rule 60(b)(1) to show that she should be relieved from the dismissal order because of 'mistake, inadvertence, surprise, or excusable neglect.' "

CONCLUSION

a. Judge Ryan's exercise of his discretion was reasonable, justified, and conducted with full notice and scrupulous regard for law and procedure.

b. The Court of Appeals was correct in holding that Judge Ryan's order was no departure from the accepted and usual course of judicial proceedings, and in fact was "well within the limits of sound discretion".

c. The proceeding and result below, it is respectfully contended, do not call for an exercise of this Court's power of supervision.

Respectfully submitted,

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